questions that interconnection, unbundling, and resale will greatly challenge State efforts to preserve universal service while still promoting competitive alternatives. A careful crafting and rebalancing of State rates will be necessary as the impact of these changes begins to be felt. The States will undoubtedly be troubled by national rules that leave them little or no flexibility to influence network arrangements or set prices for intrastate services.

If the Commission preempted the States' authority to set all intrastate rates, then applied price ceilings that prevented the recovery of incumbent LECs' total costs, the Commission would force the States to make up the shortfall elsewhere; and the only way they can do that is by raising local rates or increasing universal service funding burdens. National rules should not foreclose workable State alternatives that are consistent with the pro-competitive intent of the Act.

3. **There Is No Conflict Between Sections 2(b) and 251, But If There Were, Section 2(b) Would Govern**.

The Commission requests comment on its tentative conclusion that "section 251 applies to certain 'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.' In enacting section 251 after section 2(b) ... Congress intended for section 251 to take precedence over any contrary implications based on section 2(b)." (*Notice*, para. 39.)

Congress did not intend for Section 251 to "take precedence" over Section 2(b). To interpret the statute in a way that creates such a conflict would violate one of the oldest principles of statutory construction -- that a statute not be interpreted to be internally

inconsistent.[33] Rather, Congress intended that the FCC continue to oversee any interstate aspects of interconnection, and the States (except for specific items such as number administration) continue to oversee the intrastate aspects -- including, most notably, costs and prices. Thus, Section 252(c)(2) requires the State commission to review arbitrated agreements according to this Commission's regulations, but it also makes clear Congress's expectation that those regulations will not establish rates for interconnection, network elements, or wholesale services: The "State commission shall ... establish *any* rates for interconnection, services, or network elements" (emphasis added).[34] Section 252(d) repeats that "State commission[s] shall determine" just and reasonable rates for interconnection, wholesale services, and network elements.[35] The overwhelming majority of interconnection traffic will be intrastate. Had Congress intended the FCC to "determine" or "establish" prices, it would have put the pricing standards in Section 251 and merely instructed the States in Section 252 to follow the FCC's regulations.

Section 252 grants only one active power to the FCC, the power in Section 252(e)(5) to preempt the State commission's jurisdiction if it fails to act. That power, however, comes with an unusual and explicit proviso that the FCC *assume the responsibility of the State commission* under this section with respect to the proceeding or matter and *act for the State commission.*"[36] Congress said that Section 252(e) "preserves State authority to

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[33] *See Washington Market Co. v. Hoffman*, 101 U.S. 112 (1879).

[34] Act, Section 252(c)(2).

[35] *Id.* at Section 252(d)(1), (3). See also Conference Report, pp. 125-26.

[36] *Id.* at Section 252(e)(5).

enforce State law requirements in agreements approved under this section."[37] Under 252(e), if the Commission were required to act for a State in reviewing an agreement adopted by negotiation, and there were any conflict between the Commission's own rules and the requirements of that State, the Commission would be obliged to lay its own rules aside and enforce the State's. Likewise, the State PUC is to review statements of generally available terms under Section 252(f)(2) in accordance with the FCC's Section 251 rules, but with this proviso: "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review."

Lest it not be clear from Section 252 how important it considered the States' roles in approving the particular terms of local competition, Congress included in Section 251 a red flag to the Commission. Section 251(d)(3) provides:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -- (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Under this provision, the FCC may not set aside any regulation, order, or policy of a State commission merely because it conflicts with the FCC's rules.

If there is any conflict between Section 2(b) and Section 251, we believe the Commission's tentative conclusion that the latter section will govern is wrong. The

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[37] Conference Report, p. 126.

Commission has been down this path before. In 1980 and 1981 it preempted State depreciation rates on the basis that Section 220 overrode Section 2(b), and "by its terms confers exclusive regulatory power over depreciation on the FCC." The Supreme Court reversed.[38] Section 2(b), it held, "contains not only a substantive jurisdictional limit on the FCC's power, but also a rule of statutory construction."[39] To overcome 2(b), a subsequent section of the Act must be "so unambiguous or straightforward as to override the comment of Section 152(b) that '*nothing* in this chapter shall be construed to apply or give the Commission jurisdiction over intrastate service."[40] Thus, if there is any significance to the fact that Section 251 was enacted after Section 2(b), it leads to a conclusion opposite the Commission's. In the event of a conflict. Section 2(b) governs.

B. The Safe Harbors for Section 251(c) Should Include Approaches Developed by California and Other Leading, Pro-Competitive States

The Commission seeks comment on whether it should establish "standards and procedures by which carriers or other interested parties could seek to demonstrate that a particular LEC should be treated as an incumbent LEC pursuant to Section 251(h)(2)." (*Notice,* para. 44.) It also seeks comment on whether State commissions are permitted "to impose on carriers that have not been designated as incumbent LECs any of the obligations the statute imposes on incumbent LECs."

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[38] *Louisiana Public Service Com. v. FCC*, 476 U.S. 355, 369 (1986) ("*Louisiana*").

[39] *Id.* at 373.

[40] *Id.* at 377 (emphasis in original).

We agree that the Commission should establish standards and procedures by which new entrants should be treated as incumbent LECs. The Commission should impose the same duties on all similarly situated carriers If a CLC has "substantially replaced" an incumbent LEC, then the Commission should impose Section 251(c) duties on the new entrant. The Commission should define "substantially replaced" flexibly. For example, a new entrant will have "substantially replaced" an incumbent LEC if its revenues in the area exceed the incumbent LEC's, even if the incumbent LEC has a greater number of subscribers. "Area," for purposes of 251(h)(2)(A), is not limited to the incumbent LEC's entire franchise area, but may be as small as an exchange.

The statute in no way limits the authority of *State* commissions to impose Section 251(c) duties on any carrier. On the contrary, as we read Section 251(d)(3), the Commission may not interfere with State rules that impose "access and interconnection obligations" on all similarly situated local exchange carriers, unless the rules are otherwise inconsistent with the Act.

1. <u>There Is No Formula That Everyone Must Follow To Demonstrate "Good Faith Negotiation." The Process Should, However, Include Bona Fide Request Guidelines to Speed Consideration of and Agreement On Interconnection Requests</u>.

The Commission requests comment on whether it should "establish national guidelines regarding good faith negotiation under section 251(c)(1)." (*Notice,* para. 47.) The precise meaning of "good faith" in particular circumstances -- like the meanings of "feasible" and "reasonable," other undefined terms in the Act -- is not an issue that lends itself to rulemaking, but is a question to be answered based on the totality of the

circumstances.[41] We do not believe the Commission should try to define "good faith," but we do believe that it should establish a process, which we describe below, that seeks to encourage good faith. This process should be deemed reasonable and sufficient to satisfy Section 251(c)(1), but not the sole means to do so.

Section 251(c)(1) imposes a duty of good faith on requesting carriers as well as incumbent LECs. In our judgment this reflected a Congressional recognition that incumbent LECs would not, as the Commission believes, "have vastly superior bargaining power" (*Notice*, n.19), but that *requesting* carriers will generally have an incentive to delay the BOC's entry into in-region interLATA for as long as possible.

To prevent abuse of the negotiation process, while assuring that incumbent LECs respond to all good faith requests, the Commission should establish uniform national guidelines for evaluating the technical feasibility of interconnection requests. This process, which States would be free to modify or supplement, would ensure that new entrants enjoy uniform interconnection treatment across the nation, without compromising what private parties and State can bring to the process, or requiring detailed interconnection mandates that may not be universally appropriate or may discourage the deployment of updated technologies.

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[41] For example, compliance with the duty to negotiate in good faith established in the National Labor Relations Act (29 U.S.C. Sections 151-158) is not determined by a laundry list of good faith factors. Instead, the good faith requirement simply directs employers to turn over "relevant" information to the labor representative. Whether this duty is met by a particular employer is a determination that is made based on the totality of the circumstances. See *Detroit Edison Co. v. National Labor Relations Board,* 440 U.S. 301 (1979); *see also National Labor Relations Board v. Schwab Foods, Inc.*, 858 F.2d 1285, 1292 (7th Cir. 1988) ("[t]he determination of whether a party negotiated in good faith must be based on the totality of the circumstances").

A CLC would first submit a bona fide request containing a certification that it intends to use the requested interconnection or unbundled element in the provision of a competitive exchange or exchange access service;[42] a full description of the functionality requested, including illustrative diagrams and technical requirements and specifications where necessary;[43] and a commitment to pay the reasonable costs of implementing the request.[44] The requested interconnection arrangement or unbundled element would then be evaluated for technical feasibility. Technical feasibility is the determination of a LEC's ability to provide a requested interconnection arrangement or unbundled service in a nondiscriminatory manner, using currently available technology in service or under deployment, and within the time requested, or within a negotiated time. Technical feasibility will include, but not be limited to: (1) ability to maintain network integrity without undermining network reliability, increasing the risks of physical damage, service impairment, service degradation, service outage, or creating a hazard or security threat to customers, customer communications, proprietary information, or operating personnel; (2) ability to deliver network elements that are discrete, standalone, physical or logical functional components of the existing network that, in turn, comply with national standards; (3) ability to assure that physical and/or logical interconnection points are provided so that they meet the service and network security needs

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[42] As the Conference Report states, "the duties imposed under new section 251(b) make sense only in the context of a specific request from another telecommunications carriers or any other person who actually seeks to connect with or provide services using the LEC's network." Conference Report, p. 121.

[43] Technical requirements or specifications, which define the unbundled functionality or interface, are those with which a vendor designs the unbundled functionality or interface, and against which the unbundled functionality or interface is tested.

[44] H.R. Rep. No 104-104, 104th Cong., 1st Sess. at p. 71.

of the requesting service provider, the incumbent LEC network, and the public; (4) ability to meet applicable or negotiated performance parameters (e.g., post-dial delay, cross network packet delay, transmission levels); (5) sufficient capacity to supply the item on a nondiscriminatory basis to multiple requestors; (6) negotiation of support systems to administer, provision, maintain, or order without unique or special handling or billing; (7) willingness to pay costs with a reasonable profit; (8) ability of requested interconnection or element to successfully complete a field trial evaluation or other field trial evaluation (if publicly available); and (9) ability of equipment vendors to develop and/or support a requested capability. The process should establish time for the LEC to request additional information if necessary.

Sections 251-52 and 271 should not require LECs to develop new network capabilities, introduce new retail services solely for resale, or expand current facilities to facilitate interconnection with CLCs. The Commission should make clear that incumbent LECs do not have to build new facilities or obtain any necessary permits (such as construction permits) for new entrants. Therefore, the CLC's request should show it has all permits or licenses needed to make use of the unbundled element or interconnection at the requested point.

The process also would consider the cost and timing of implementing the request. The incumbent LEC's ability to support the request with administration, provisioning, maintenance, ordering and billing will influence the cost of providing the arrangement and the time required to deploy it Consistent with the legislative history on unbundling and interconnection, the requesting party must agree to bear the associated costs. If we incur up-front costs to make an interconnection arrangement or unbundled element

available, CLCs must in fact commit to purchase them. A commitment to reimburse is consistent with the Act's provision that prices of interconnection and network elements be set to recover costs (Section 252(d)(1)) and wholesale prices for services be set to reflect costs that "will be avoided" (Section 252(d)(3)).

This process would be consistent with the process for responding to enhanced service provider requests for new ONA basic services.[45] Thus, after we receive a bona fide request, we would have a stated period of time to inform the requesting CLC of whether the requested interconnection arrangement or unbundled access element is technically feasible. The time that it takes us to provide a particular interconnection arrangement, unbundled element, or resold service will vary from LEC to LEC, and should be dealt with in the "good faith negotiation" stage, because of the need to set up ordering, provisioning, and billing for each request.

The Commission should adopt a similar approach for interconnection that recognizes the uniqueness of each negotiation. If good faith guidelines are instituted, they should be used to determine when good faith may be presumed. They should not be used to determine when good faith is absent.

The Commission requests comment on whether Section 252(a)(1) requires parties that have existing agreements to submit those agreements to State commissions for approval. We do not believe this is a significant issue, since most agreements are limited in time and parties will have ample opportunity to renegotiate them in light of any new statutory

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[45] *Filing and Review of Open Network Architecture*, 4 FCC Rcd 1, para. 397 (1988).

requirements.[46] However, we do not believe that 252(a)(1) requires interconnection agreements that have already been approved by the States to be re-submitted. The section was to promote competition by allowing parties, if they wished, to submit agreements for State approval that had been negotiated but not yet submitted at the time of the 1996 amendments; if Congress had wanted agreements that had already been approved to be re-submitted for re-approval, it would have so provided. Renegotiation or arbitration of such agreements would be wasteful and would not promote local exchange competition. It would undermine the contracting process by interfering with parties' settled expectations. As the Commission elsewhere acknowledges, interconnection agreements are "the product of compromise between incumbent LECs and requesting carriers, and may therefore contain provisions to which a party agreed as specific consideration for some other provision." (*Notice,* para. 271.) Thus, mandatory renegotiation could unfairly penalize one party.[47]

2. Interconnection, Collocation and Unbundled Elements Are Separate Considerations With a Common Goal -- the Seamless and Workable Joining of Competing Networks.

a. Interconnection Physically Links Two or More Networks

(1) Technically Feasible Interconnection Points Are Those Employed Today In Central Offices and Tandems. Nothing Further Should Be Mandated.

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[46] Our interconnection agreement with MFS, for example, is for a two year term.

[47] Based on its reading of the Act, the Michigan Public Service Commission has denied without prejudice a request from AT&T that sought the filing of such contracts. *Petition of AT&T Communications of Michigan, Inc., for a Commission Order requiring local exchange carriers to comply with provisions of the federal Telecommunications Act of 1996*, Michigan Public Service Commission Case No. U-11056 (April 10, 1996).

The Commission tentatively concludes that "uniform interconnection rules would facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirements." (*Notice,* para. 50.) The Commission also seeks comment on the consequences of not establishing such specific rules, and:

> whether there are instances wherein the aims of the 1996 Act would be better achieved by permitting states to experiment with different approaches..... For example, how would variations in the definition of 'technical feasibility,' the number of required points of interconnection, and methods of interconnection, affect the ability of new entrants to plan and configure regional or national networks? ... Would a lack of explicit national standards reduce predictability and certainty, and thereby slow down the development of competition? (*Notice,* para. 51.)

Notably, this inquiry comes only after the Commission recognizes that technical variation among networks might render such "explicit national standards" infeasible (*id.*).

Interconnection is already widespread in states such as California, Illinois, Michigan, and New York, where it is founded on interconnection at the end office or tandem. In addition, interconnection through collocation cages is prevalent in these states. We believe the Commission should find that an interconnection agreement satisfies Section 251, as well as Section 271(c)(2)(B)(i), if it provides interconnection upon request at tandem and/or end office switches, (2) provides interconnection upon request at any other point where the BOC currently makes interconnection available, and (3) there is a publicly disclosed, non-discriminatory process for considering bona fide requests from

interconnecting parties for interconnection at other technically feasible points within a reasonable time.[48]

This proposed "safe harbor" is preferable to a "minimum requirement": it will foster certainty and predictability and promote prompt decision-making, as the Commission seeks, but will not result in the unintentional adoption of unrealistic requirements or preclude parties from experimenting with other arrangements. The Commission does not have time to consider all relevant factors in adopting mandatory rules. There is a real danger that inflexible standards would prove technically infeasible, simply as a result of the Commission's inability to compile and analyze a complete record. Adopting such rules would create uncertainty and delay compliance with the statutory deadlines, and therefore would undermine rather than advance the Commission's goals.

The Commission must guard against rules that undercut a fundamental objective of the Act -- the entry of LECs into the interLATA market. Rules requiring types of interconnection or access to network elements that "might" work, or which sound attractive, but which have never been ordered, deployed, tested, or provisioned, will simply slow down much-needed competitive entry. Faced with such rules, LECs will receive requests of no proven value, but which could take months or years to develop. In short, forms of interconnection (or requests for unbundled elements) that have never been used or

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[48] Other measures may be needed to prevent CLCs from using interconnection requests merely to delay the entry of RBOCs into in-region long distance. For example, a CLC might make multiple requests for essentially the same interconnection in different parts of the same State, yet spread the requests over a prolonged period of time. A guideline may be necessary that requires interconnection requests to be made on a whole-state basis, rather than exchange-by-exchange.

tried (such as "manhole collocation," sub-loop unbundling, or unbundling of "virtual" switch capacity) must be sorted out by the parties through negotiations, and not imposed as a matter of Commission rule.

We have negotiated numerous interconnection agreements with CLCs. We have not found technical standards to be so controversial that "national standards" would be required. All carriers have a strong interest in developing and maintaining national standards in the development of technology and the interconnection of their networks to ensure the reliability and efficiency of the network. SS7, for example, is already the national standard for signalling between networks. Both local exchange and exchange access (FGD) signalling are standard between equipment vendors and carriers. The facilities used in public switched networks are also standardized at DS1 and DS3 signal rates. The ANSI, ICCF, NOF and other fora operating under the umbrella of the Alliance for Telecommunications Industry Solutions (ATIS) enjoy wide participation and support from all segments of the industry. The T1 Committee is accredited by the American National Standards Institute. It is open to all parties, free of dominance, and uses due process procedures to ensure fairness. It can bring together carriers, vendors, and users to address industry technical issues. The IILC has been praised by the Commission for capably addressing the stated needs of the industry for ONA issues.[49] The Ordering and Billing Forum (OBF) successfully addresses ordering and provisioning issues.

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[49] *See Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, para. 52 (1988).

The Commission also requests comment on the distinctions between interconnection, transport and termination, and unbundled network elements under the Act. From our perspective, "interconnection" refers only to the connection between networks, using an interface at a point of interconnection (or collocated facility) to allow the transfer of communications traffic from one network to the other. Each connecting network uses its own network facilities on its side of the POI to complete the interconnection. An incumbent LEC may provide transport links to the CLC's network to facilitate interconnection, but that is not "transport and termination" as referred to in Section 252(c)(2). "Transport and termination" is made possible by interconnection, but it is not the same thing as interconnection. It refers to services purchased by one LEC from another LEC under which the second LEC agrees to carry the first LEC's local traffic to its intended destination over the second LEC's network, where the called party is a customer of the second LEC.[50] "Network elements" refer to portions of the second LEC's network that the first LEC may purchase in order to carry communications originating on its network to their intended destination under its own rather than the second LEC's control.

A number of parties may seek to blur these distinctions for their own private interests. In no event should IXCs be free to piece together various network elements to provide end-to-end telecommunications services using only the LEC's network. The blurring of distinctions between interconnection, network elements, transport and termination of calls, and resale; the splintering of the network into (literally) bytes and bits; and uneconomically

[50] The CPUC has adopted this as one of its "preferred outcomes." If transport and termination are not limited to local traffic, Section 251(g) would be effectively read out of the Act. We discuss this more below, at §I.C.5.

low prices that encourage inefficient behavior, would give IXCs every incentive *not* to build their own competitive local exchange facilities, but only to become masters of arbitrage. The Commission should clarify that the term "network element" does not include any service that is a telecommunications service under the Act.

The Commission encourages parties to submit information on the approaches taken by States that have allowed interconnection; and whether any elements of these State approaches would be suitable for incorporation into national standards implementing the Act. (*Notice,* para. 52.) As we described above (§I.A.1), in California, LECs are required to negotiate interconnection agreements under the review and auspices of the CPUC. The agreements reached so far discredit the "one-size-fits-all" approach of "national standards." CLCs have negotiated different interconnection arrangements because they have different market strategies, infrastructure, and traffic volumes. In some cases our tandems will be the most efficient interconnection point for a CLC, while in others our end offices will be. Some CLCs prefer interconnection transport to be one-way trunks; others two-way trunking.[51] Some prefer the point of interconnection to be at a collocation point; others at their switch. Some will deploy their own access and local trandem switches in competition with the incumbent LEC. Some CLCs (three of the five who have signed interconnection agreements with us) prefer bill and keep for transport and termination of local calls; others (two of the five) have opted for forms of reciprocal compensation.

The Commission tentatively concludes that interconnection should be required "at a particular point ... if any incumbent LEC currently provides, or has provided in the

[51] This means that the incumbent LEC and the CLC share the facility linking their networks.

past, interconnection to any other carrier at that point, and that all incumbent LECs that employ similar network technology should be required to make interconnection at such points available to requesting carriers." The Commission mentions the trunk- and loop-side of the local switch, transport facilities, tandem facilities, and signal transfer points. (*Notice,* para. 57.) The Commission asks for comment on whether it "could allow other states to determine whether interconnection at a greater number of points would also be technically feasible." (*Notice,* para. 58.)

We strongly disagree with an approach that would mandate interconnection at another point merely because one State commission or one carrier decided it was desirable. Such an approach is unrealistic and would invite cynical manipulation. The statute envisions private parties and the States deciding on the best interconnection points for *themselves*, not for other parties and other States. Interconnection at the trunk- and loop-side of the local switch, transport facilities, tandem facilities, and signal transfer points are widely feasible, but by no means universally so.

Mandatory interconnection at other points may raise even more complex issues of geographic differences in availability, differences in the availability of network equipment, capacity limitations, harm to the network or LEC customers, the proprietary interests of the LEC, the LEC's ability to maintain service consistent with industry standards, the LEC's ability to accommodate multiple requests consistent with its nondiscrimination obligations, and other considerations that do not lend themselves to detailed nationwide rules. For example, in its broadband network, Pacific Bell uses a subscriber loop technology from Lucent Technologies that will not allow interconnection in the local loop between the switch

port and the subscriber premises. The broadband network uses loop elements that are unlike those in traditional telephony. The bandwidth is managed by a Host Digital Terminal (HDT) whose design is proprietary to Lucent Technologies. As we discuss below, one effect of detailed, mandatory rules could be to preclude the development or deployment of such new technologies. By devolving such granular issues as sub-loop interconnection to States and private parties, the Commission would not be ensuring that such issues are unaddressed -- merely that they will be addressed based on what is locally feasible.

The Commission requests comment on whether differences in technical variations among States may affect the ability of new entrants to plan and configure regional or national networks, and how such variations would affect new entrants' abilities to deploy alternative network architectures, such as SONET rings. (*Notice,* para. 51.) We do not believe that technical variations present an obstacle to the deployment of national networks. As a practical matter LECs, CLCs, IXCs, other carriers, and private networks are required to interconnect today, and do so seamlessly despite occasional technical variations. For example, SONET ring technology is proprietary to various manufacturers such as Nortel, Fujitsu, and Lucent. But AT&T (which uses Lucent) has no difficulty interconnecting today with Pacific Bell (which uses Nortel). The Commission should not dictate technical specifications for interconnection either to LECs or to equipment manufacturers. Bellcore standards were more than adequate to encourage interconnection before the passage of the 1996 Act, and there is no reason to think they will not be adequate in the future.

The Commission also seeks comments on "additional points at which LECs currently provide interconnection." (*Notice*, para 58.) By agreement, we have provided for

STP-to-STP CCS interconnections in each LATA where a CLC provides service, through a digital hand-off at a collocation site the CLC designates within the LATA or at other points as necessary and jointly agreed to by the CLC and Pacific Bell.

(2) Numerous Interconnection Agreements Around the Nation Reflect Just, Reasonable, and Nondiscriminatory Interconnection. Explicit National Interconnection Standards Are Unnecessary and Unwise.

The Commission requests comment on whether it should adopt "explicit national standards for the terms and conditions for interconnection." For example, the Commission might adopt standards concerning the payment of the non-recurring costs associated with installation; or require LECs to meet "agreed upon performance standards for installing or repairing interconnection facilities and pay liquidated damages for any failure to satisfy the agreement." (*Notice*, para. 61.)

Such "explicit national standards" sound to us like the fine print of intrastate tariffs. No rationale supports them. Since 1984, hundreds of IXCs have managed to deploy seamless national networks despite having to obtain exchange access on different terms and conditions in every State. State commissions should be allowed to continue to impose reasonable conditions on interconnection requests, including but not limited to requiring earnest fees or charges for nonrecurring costs. "Performance standards" for repairing or installing facilities would be unnecessary and counterproductive. For example, the Multiple Exchange Carrier Ordering Document (MECOD) was developed by the Ordering and Billing Forum (OBF) and agreed to by LECs, IXCs, and CLCs at the national level. The national document has been augmented in California to cover ordering, provisioning, design, and maintenance of switched and special access when it is jointly provided by two or more LECs

or CLCs. Industry fora such as the OBF, freely negotiating parties, or State commissions if parties fail to agree, are best situated to determine what other practices are reasonable under local circumstances. The CPUC, for example, left provisioning standards to be negotiated, concluding, "we could not realistically specify a standard provisioning time for each of the innumerable intercompany interconnection arrangements that are possible."[52]

There is no reason for the Commission to require special provisions, such as liquidated damages, to provide "incentives" for parties to perform contracts. By encouraging litigation or claims of breach, such provisions could raise more disputes than they would resolve. The Parties themselves are best situated to decide what performance guarantees are suitable. If either party is aggrieved by the other party's non-performance of a contract, there is no reason to believe that traditional legal venues, including courts, State commissions, and complaints filed at this Commission, will not suffice to remedy any breach.

(3) Interconnection That Is "Equal In Quality" Should Be Based on Customer Perception.

The Commission seeks comment on what criteria may be appropriate in determining whether interconnection is "equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." (*Notice,* para. 63.) In the FCC's equal access proceedings, the Commission concluded that "a definition of equality that is overly quantitative and

[52] CPUC Interconnection Decision, p. 64.

microscopic in detail is impractical."[53] Instead, the agency endorsed the use of "customer perception" as the appropriate measure of equality and noted that "'absolute technical equality' need not be assured."[54] A similar determination is warranted here.

(4) Interconnection Can and Should Occur At Established Collocation Points, But "Interconnection" Does Not, In and Of Itself, Satisfy The Duty to Provide Reciprocal Compensation.

The *Notice* seeks comment on the relationship between the interconnection requirements in section 251(c)(2) of the Act and the collocation provisions of section 251(c)(6). The FCC suggests that the latter section does not limit its authority to require "incumbent LECs to make available a variety of technically feasible methods for interconnection" including "meetpoint arrangement[s] as well as physical and virtual collocation." (*Notice*, para. 64). In fact, however, the D.C. Circuit has made clear that, absent an express grant of authority such as that contained in section 251(c)(6), the Commission lacks the power to require collocation.[55] Accordingly, section 251(c)(2) cannot be read to expand by implication the authority embodied in section 251(c)(6).

It follows that the Commission's ability to require collocation is solely derived from and constrained by the express language of section 251(c)(6) of the Act. That provision limits any taking of incumbent LEC property to that required for the collocation of "equipment necessary for interconnection." As discussed below, that phrase should be

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[53] *MTS/WATS Market Structure*, 100 F.C.C.2d 860, para. 58 (1985) (subsequent history omitted).

[54] *Id.* (footnote omitted).

[55] *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 441 (D.C. Cir. 1994).

construed consistent with the agency's *Expanded Interconnection* orders to encompass only the equipment needed to terminate basic transmission facilities. Moreover, the type of virtual collocation established by the Commission in the *Virtual Collocation Expanded Interconnection Order* involves the same type of "taking" of LEC central office space for the benefit of the interconnector as physical collocation. Thus, it is likewise limited by the authority derived from section 251(c)(6) rather than section 251(c)(2),[56] and may only be mandated where a substitute for physical collocation is required.

Even if the Commission could generally order virtual collocation in addition to physical collocation, it should not do so. The Commission already has correctly determined that generally ordering both is unnecessary.[57] The additional burden and inefficiency of having to train and have on hand technicians capable of operating and maintaining different types of equipment is a fundamental problem with virtual collocation that would not be warranted, since virtual collocation is merely a less satisfactory means of attempting to achieve the same goals as are sought with physical collocation.[58] In addition, having the

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[56] The Commission required initial offerings of collocation at certain central offices, serving wire centers, and tandem offices. In addition, in the *Virtual Collocation Expanded Interconnection Order* (para. 39), the Commission reaffirmed that, based on bona fide requests, "LECs must provide: (1) both special access and switched transport expanded interconnection at central offices that are classified as end offices and serving wire centers, (2) special access expanded interconnection at remote nodes that are rating points for special access; and (3) switched transport expanded interconnection on a bona fide request basis at 'stand-alone tandems' and at remote nodes that serve as rating points for switched transport and have the necessary space and technical capabilities to originate and terminate switched traffic."

[57] *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341, paras. 58-59 (1993).

[58] *See Expanded Interconnection with Local TelephoneCompany Facilities*, 7 FCC Rcd 7369, paras. 32, 33, 39 (1992) ("Special Access Expanded Interconnection Order").

collocators' equipment on our premises makes it difficult to use our workforce efficiently and subjects the workforce to conflicting demands. Collocators tend to rely on us to "prove in" the technical feasibility of their own equipment, and insist on methods and procedures for their equipment that are different from our own.

Any meet point arrangements that the Commission might order under section 251(c)(2) would have to be consistent with the standards of that section and section 252. For instance, the meet point would have to be at a technically feasible point "within" the LEC's network. Section 251(c)(2) could not be used to require a LEC to expand its network to meet a telecommunications carrier outside the LEC's existing network. Moreover, standards for transport and termination of traffic via any meet point arrangement would have to be based on reciprocal compensation[59] with "mutual and reciprocal recovery by each carrier of costs associated with transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[60] A carrier could not be required to forgo recovery of the costs associated with terminating traffic for others on its side of the meet point. Parties can agree to "waive mutual recovery" based on bill and keep and other arrangements,[61] but cannot be ordered to do so.

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[59] Act, Section 251(b)(5).

[60] *Id.* at Section 252(d)(2)(A)(i).

[61] *Id.* at Section 252(d)(2)(B)(i).

b. Collocation Under Current Guidelines Is Sufficient For Interconnection and to Promote of Local Competition. Virtual Collocation Should Not Be Mandated, and Other Departures From Current Practices Should Flow From Negotiations, Not Commission Mandates.

The Commission tentatively concludes that it "should adopt national standards where appropriate to implement the collocation requirements of the 1996 Act." (*Notice*, para. 67). The Commission seeks comment on that tentative conclusion and on the extent to which it "should establish national rules for collocation that allow for some variation among states...." (*Notice*, para. 68.)

The Commission should identify safe harbors that are sufficient, but not mandatory, to comply with the collocation requirement in section 251(c)(6). The Commission should readopt its original standards governing physical and virtual collocation for special access and switched transport expanded interconnection, as discussed below.[62] The Commission spent years developing these requirements, and there is no need to waste resources reinventing them. They are well understood, and Congress would have expressly directed that they be revised if it had so intended.

The Commission should not make these safe harbors mandatory because parties and the states need flexibility to establish arrangements that meet specific, local

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[62] The Commission required initial offerings of collocation at certain certain central offices, serving wire centers, and tandem offices. In addition, in the *Virtual Collocation Expanded Interconnection Order* (para. 39), the Commission reaffirmed that, based on bona fide requests, "LECs must provide: (1) both special access and switched transport expanded interconnection at central offices that are classified as end offices and serving wire centers, (2) special access expanded interconnection at remote nodes that are rating points for special access; and (3) switched transport expanded interconnection on a bona fide request basis at 'stand-alone tandems' and at remote nodes that serve as rating points for switched transport and have the necessary space and technical capabilities to originate and terminate switched traffic."

interconnection needs.[63] The use of non-mandatory federal safe harbors has worked well in the past with collocation. The CPUC has adopted requirements for intrastate expanded interconnection based fundamentally on the Commission's interstate expanded interconnection requirements.[64] On this basis, expanded interconnection with physical collocation for both intrastate and interstate services is very successful in California. As of May 1, 1996, Pacific Bell provided physical collocation, in lieu of virtual collocation, in 67 central offices to nearly a hundred and fifty collocation cages. We have multiple orders for collocation space in many of those offices (as many as seven in one office).

The Commission notes that California's "preferred outcomes" approach for parties negotiating interconnection for local competition is consistent with the rules that the FCC previously established for physical collocation. (*Notice*, para. 69 and n.91.) This approach of allowing parties and states the flexibility to move forward with assistance from national guidelines should be fostered by the Commission. This approach balances the need to allow agreements to reflect local conditions with the need to provide a sufficient degree of certainty to ensure that local competition moves forward quickly and that BOC compliance under section 271 can be evaluated within the statutory time frame. (See *Notice*, para. 68.)

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[63] For instance, with expanded interconnection for interstate access services our requirement that interconnectors request additional space only when each of the customer's existing 100 square foot space segments are occupied by at least six bays of equipment, has met interconnector needs and ensured efficient use of valuable central office space. With expanded interconnection for local competition, however, demand for space for collocation of transport equipment by a single interconnector can sometimes be greater.

[64] *Open Access to Bottleneck Services and Network Architecture Development (OANAD)*, CPUC D. 95-04-073, slip op. at 2 (April 26, 1995).

Accordingly, California's approach to collocation should be considered a "safe harbor" for compliance with the Act.

As a safe harbor for virtual collocation under the Act, the Commission initially should use the original description that it developed for virtual collocation as a limited substitute when physical collocation was not feasible.[65] The Act establishes this same type of regime, with physical collocation as the primary requirement. Thus, there is no need for the additional virtual collocation provisions that the Commission added after the D.C. Circuit overturned mandatory physical collocation [66] The added provisions, for instance, required LECs who used agents for their own installation, maintenance, or repair to let agents of collocators into the LECs' central offices to perform the same tasks, and yet did not provide for the security measures of physical collocation (e.g., cages around collocated space). With physical collocation now as the primary requirement under the Act, there is no need to recreate this security risk. Moreover, the Commission should move toward replacing its original form of virtual collocation with less onerous forms that have become available subsequent to the Commission's adoption of the original standards.[67]

The Commission's goal in the Expanded Interconnection proceeding for determining LEC locations in addition to central offices for collocation was to "ensure that collocation is available to interconnectors where remote nodes perform functions similar to

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[65] *Special Access Expanded Interconnection Order*, paras. 69-109.

[66] *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 515 paras. 40-67 ("*Virtual Collocation Expanded Interconnection Order*").

[67] *See, for example,* letter from Stephen S. Menikoff of Southwestern Bell to William F. Caton, FCC, July 7, 1994, CC Docket 91-141, concerning SONET-based interconnection.